

CRIMINAL APPEAL NO. 734 OF 1990.

Date of decision: 25.11.1996

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr. S.R. Divetia, A.P.P. for the appellant-State.

Mr. Y.S. Lakhani, advocate for the respondent.

1. Whether Reporters of Local Papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? No
3. Whether their Lordships wish to see the fair copy of judgment? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No

Coram: R.R.Jain,J.

-----

November 25 , 1996.

Oral judgment:

Aggrieved by the judgment and order passed by the learned Chief Judicial Magistrate, Bharuch, acquitting the respondent/original accused of the charge levelled under Section 409 of the Indian Penal Code, the State has preferred this appeal under Section 378 of the Code of Criminal Procedure.

Briefly stated, the facts giving rise to the present appeal are as under:

The original accused/respondent herein- Kalyansinh

Bhagwansinh Yadav, was serving as Senior Clerk in the office of the Taluka Panchayat, Valia and was in-charge of financial affairs. During the course of discharge of his duties he received Rs.30,516.55 as the amount of professional tax and house rent allowance deducted from the salary of other employees for the period between July 1984 and December 1984 and April 1985 and October 1985 but the same was not deposited with the concerned authorities. Similarly, as alleged, the accused withdrew a sum of Rs.5,670/- from the bank for the period between 2.3.1986 and 13.5.1986 and did not account for the same. It is further alleged that a sum of Rs.4,715/- received on behalf of the Jilla Gram Vikas Agency and other like amounts received by him were not accounted for and thus having misappropriated has committed an offence of breach of trust as contemplated under Section 409 of the IPC.

In this case, in order to bring home the guilt, the prosecution has examined as many as 16 witnesses to prove entrustment but has not produced any documentary evidence to establish breach of trust and misappropriation so as to bring the case within the parameters of Section 409 of the IPC. The prosecution has proved that at the relevant time the respondent/accused was serving as Senior Clerk in DRDA branch of the Taluka Panchayat, Valia. Even on admitted facts also I find no dispute in this regard and, therefore, the respondent was a public servant and was having dominion over the public property in his capacity as a public servant, is amply established.

As a cardinal rule, in order to convict any person under Section 409 of IPC the prosecution has to prove entrustment of property and misappropriation thereof amounting to breach of trust. I have carefully gone through the judgment and the reasons assigned by the learned Chief Judicial Magistrate, Bharuch. Though the entrustment is proved misappropriation thereof has not been proved nor is established by any stretch of imagination. Since the facts and the allegations made are based on books of accounts, the misappropriation or breach of trust could have been established by producing books of accounts. But, for the reasons best known, the prosecution has failed to produce even an iota of documentary evidence. Consequently, in such circumstances, a person charged cannot be convicted for breach of trust or misappropriation, may be temporary or permanent. In my view, in absence of any cogent and concrete documentary evidence to establish misappropriation and breach of trust, I do not find any illegality in appreciating the evidence. The learned Chief Judicial Magistrate has not committed any error in

discarding the case of prosecution as levelled against the respondent. The entire prosecution case sans documentary evidence which was in possession and could have been easily produced to prove the case, the learned Chief Judicial Magistrate was left with no alternative than to pass the acquittal order.

Mr. H.M. Prachhak for Mr. Y.S. Lakhani, the learned advocate for the respondent, has also invited my attention to the observation made by the learned Chief Judicial Magistrate on page 5 of the judgment. According to the observation, ample opportunities were given to the prosecution to produce documentary evidence yet the prosecution did not produce any document to prove misappropriation of money or breach of trust. It will not be out of place to mention here that though the prosecution has examined as many as 16 witnesses, none of them has supported the prosecution case for misappropriation of money or breach of trust and thus, in my view, the learned Chief Judicial Magistrate has rightly rejected the case of prosecution by acquitting the respondent. Thus, the appeal being devoid of merits deserves to be dismissed. Accordingly, the appeal is dismissed.